**LIM YING**

**v.**

**HIOK KIAN MING ERIC**

HIGH COURT, SINGAPORE
KS RAJAH JC
[DIVORCE PETITION NO. 2560/90]
25 SEPTEMBER 1991

***FAMILY LAW:*** *Legal impediment to the marriage of persons who are not of opposite biological sex implied in the statutory definition of the monogamous marriage - Technical issues related to sex-change operation of the respondent.*

The petitioner, Lim Ying, is a Malaysian who has been residing in Singapore for at least 3 years. The respondent, is a forklift driver. On 26 July 1990, the parties were married at the Singapore Marriage Registry under the provisions of the Women's Charter (Cap 353) which provide for the solemnization and registration of monogamous marriages. The marriage was solemnized by the Assistant Registrar of Marriages after the parties had filed the required statutory declaration to obtain the marriage licence.

On 29 November 1990, a petition for divorce was filed. The petitioner was represented by Counsel. The respondent did not contest the petition and was not present nor represented by Counsel at the hearing of the uncontested petition, the Court made an order to the effect that the marriage solemnized on 26 July 1990, is a putative marriage.

In so far as Singapore marriage law is concerned, the definition of a monogamous marriage that was introduced in 1951, now appearing in s. 2 of the Interpretation Act (Cap. 1) applied to the instant case.

It was noted that a legal impediment to the marriages of persons who are not of opposite biological sex is implied in the statutory definition of the monogamous marriage.

In the instant case, the technical issues that arose in the determination of the application of the said legal impediment *(supra*) (to the petitioners divorce petition) was considered by the learned Judge.

**Held:**

**[1]** The fact that the identity card and the birth certificate have the respondent's sex as male and female respectively does not require the Court to hold that a valid marriage has been solemnized between a man and a woman. The identity card and birth certificate are official documents that serve different purposes. Reassignment surgery does not result in the acquisition of all the biological characteristics of the other sex and where the sex of person is in issue, it must be proved to the satisfaction of the Court. An identity card standing alone is not sufficient evidence.

**[2]** Singapore law in not silent on what constitutes valid monogamous marriage. The petitioner would not have consented to the marriage had she known that the respondent had undergone a sex change operation. In the circumstances, she did not freely consent to the marriage. The marriage was therefore not solemnized on the authority of a valid licence and is also void on that ground under s. 21 of the charter.

*[The petitioner is entitled to a decree of nullity declaring that the marriage solemnized is void ab initio by reason that the parties to the marriage were both of the female sex, and order accordingly.]*

**Cases referred to:**
*Corbett v. Corbett [1971] P 83* ***(foll)***
*W v. W [1976] 2 SALR 308* ***(cons)***
*Re C and D [1979] 28 ALR 524* ***(foll)***
*MT v. JT 355 A2d 204 [1976]* ***(cons)***
*R v. Cogley [1989] VR 799* ***(cit)***
*Harris and McGuinness [1988] 35 A Crim R146* ***(cit)***
*Regina v. Tan & Ors. [1983] 1 QB 1053* ***(cons)***
*Rees v. UK [1987] Family Law 157* ***(cons)***
*Cossey v. UK [1990] TLR 664* ***(cit)***

**Legislation referred to:**
Interpretation Act (Cap 1) [Sing], s. 2
Matrimonial Proceedings Rules 1981 [Sing], r. 28
National Registration Act (Cap 201) [Sing], s. 11
Registration of Births and Deaths Act (Cap 267) [Sing], s. 24
Women's Charter (Cap 353) [Sing], ss.16(2), 21, 86, 140(2), 146(2)
Sexual Offences Act 1956 [UK], s. 30
Sexual Offences Act 1967 [UK], s. 5

*For the petitioner - Ranjeet Singh*
*For the Respondent - Absent*

**JUDGMENT**

**KS Rajah JC:**

The petitioner, Lim Ying, is a Malaysian who has been residing in Singapore for at least 3 years. She is a babysitter. The respondent, Hiok Kian Ming Eric, is a forklift driver. On 26 July 1990, the parties were married at the Singapore Marriage Registry under the provisions of the Women' Charter (Cap 353) which provide for the solemnization and registration of monogamous marriages. The marriage was solemnized by the Assistant Registrar of Marriages after the parties had filed the required statutory declaration to obtain the marriage licence.

On 29 November 1990, a petition for divorce was filed. The petitioner was represented by Counsel. The respondent did not contest the petition and was not present nor represented by Counsel at the hearing of the uncontested petition. The Court made an order to the effect that the marriage solemnized on 26 July 1990, is a putative marriage, that is void. I said that a written judgment would be given on the technical issues that arose in the course of the hearing.

***The Respondent's Background***

The respondent was born in Singapore on 10 August 1953. The birth of the child was registered. The father informed the Registrar of Births that the child was of the female sex. The father named the child Hiok Geok Choo.

Sometime in 1987, the respondent had, what has been termed, a "sex-change operation". The operation, amongst other things, resulted in an artificial penis being implanted into the body of the respondent. The respondent then proceeded to change her name from Hiok Geok Choo to Hiok Kian Ming Eric. On her application, the Commissioner for National Registration changed the particulars in her identity card to state her sex as male.

***The Petitioner's Case***

The petitioner, a spinster, believed that she was marrying a man who was a bachelor and that the marriage was a monogamous marriage. The parties filed a statutory declaration under s. 16(2) of the Women's Charter. The petitioner completed that part of the prescribed form provided for the female and the respondent completed that part of the form provided for the male.

The respondent's identity card was relied upon by all parties, including the Registrar of Marriages, to satisfy themselves that the name, sex and other particulars were accurate for purposes of establishing the identity and sex of the respondent.

After the marriage, the petitioner and the respondent lived together and attempted cohabitation. The respondent admitted to the petitioner that she had undergone a sex-change operation sometime in 1987. Repeated attempts at consummating the marriage failed. The petitioner said that she would not have married the respondent if she had known that the respondent was not a man because she wanted to have children. Her consent was not obtained freely. Furthermore, since the respondent's penis was artificial, erection for sexual intercourse was not possible. Thus the marriage could not be consummated. On 2 October 1990, the petitioner filed for divorce. I accepted the petitioner's evidence that she did not freely consent to the marriage, but I will now consider her application.

The petitioner contended that there had never been a marriage between the parties because the respondent was biologically a female, and prayed for a declaration to this effect. Alternatively, the petitioner prayed for an annulment of the marriage on the basis of non-consummation due to the incapacity of the respondent.

There was no dispute as to the facts. No medical evidence was adduced. I did not consider it necessary to appoint medical inspectors under r. 28 of the Matrimonial Proceedings Rules 1981 and proceeded to hear the case on the basis of the unchallenged evidence before the Court.

The main question that had to be determined was whether the marriage between the petitioner and the respondent should be declared null and void or whether a decree of nullity should be ordered under s. 86 of the Women's Charter so that the petitioner's rights to ancillary reliefs are preserved. The subsidiary questions were:

(a) whether a person who has undergone a sex-change operation can be regarded as belonging to the sex for which reassignment surgery was undertaken for purposes of marriage under the Charter; and

(b) whether the fact that sex-change operations are permitted and a change of particulars in the identity card allowed, required the words "man" and "woman" to be given a meaning under the Women's Charter to include persons with the reassigned sex.

***The Seminal Case***

The English case of *Corbett v. Corbett* [1971] P 83 is the seminal case on the subject. The husband petitioned for a declaration that the marriage was null and void and of no effect or in the alternative for a decree of nullity on the ground that the respondent was at the time of the marriage a person of the male sex and that the marriage was never consummated owing to her incapacity or wilful refusal to do so. Nine medical witnesses gave evidence.

The petitioner and the respondent had gone through a ceremony of marriage in 1963. The petitioner knew that the respondent had been registered at birth as a male and had in 1960 undergone an operation for the removal of the testicles and the construction of an artificial vagina. After the operation, the respondent had lived as a woman. The Judge accepted the petitioner's evidence that the marriage was never consummated because of the wife's refusal to do and said at p. 107:

> I would, if necessary, be prepared to hold that the respondent was physically incapable of consummating a marriage because I do not think that sexual intercourse, using the completely artificial cavity constructed by Dr Burou, can possibly be described in the words of Dr Lushington in *D-e v. A-g (falsely calling herself D-e)* [1845] Rob. Ecc. 279, 298, 299 as 'ordinary and complete intercourse' or as 'vera copula' - of the natural sort of coitus. In my judgment, it is the reverse of ordinary, and in no sense natural. When such a cavity has been constructed in a male, the difference between sexual intercourse using it and anal or intra-crural intercourse is, in my judgment, to be measured in centimetres.

The criteria for assessing the sexual condition of an individual were considered, and, Ormrod J, at page 100 said:

> All the medical witnesses accept that there are at least four criteria for assessing the sexual condition of an individual. These are:
>
> (i) Chromosomal factors.
> (ii) Gonadal factors (that is, presence or absence of testes or ovaries).
> (iii) Genital factors (including internal sex organs).
> (iv) Psychological factors.
>
> Some of the witnesses would add:
>
> (v) Hormonal factors or secondary sexual characteristics (such as distribution of hair, breast development, physique etc which are thought to reflect the balance between the male and female sex hormones in the body).
>
> It is important to note that these criteria have been evolved by doctors, for the purposes of systematising medical knowledge and assisting in the difficult task of deciding the best way of managing the unfortunate patients who suffer, either physically or psychologically, from sexual abnormalities. As Professor Dewhurst observed, 'we do not determine sex - In medicine we determine the sex in which it is best for the individual to live'. These criteria are, of course, relevant to, but do not necessarily decide, the legal basis of sex determination.

and at p. 104:

> It is common ground between all the medical witnesses that the biological sexual constitution of an individual is fixed at birth (at the latest), and cannot be changed, either by the natural development of organs of the opposite sex, or by medical or surgical means. The respondent's operation, therefore, cannot affect her true sex. The only cases where the term 'change of sex' is appropriate are those in which a mistake as to sex is made at birth and subsequently revealed by further medical investigation.

His Lordship also considered the place of sex in marriage and said (p. 105):

> Sex is clearly an essential determinant of the relationship called marriage because it is and always has been recognised as the union of man and woman. It is the institution on which the family is built, and in which the capacity for natural hetero-sexual intercourse is an essential element. It has, of course, many other characteristics, of which companionship and mutual support is an important one, but the characteristics which distinguish it from all other relationships can only be met by two persons of opposite sex.

and later at p. 106:

> .... Since marriage is essentially a relationship between man and woman, the validity of the marriage in this case depends, in my judgment, upon whether the respondent is or is not a woman ... The question then becomes, what is meant by the word 'woman' in the context of a marriage, for I am not concerned to determine the 'legal sex' of the respondent at large.

The consequences of recognising sex-change operations was considered at p. 106:

> If the law were to recognise the 'assignment' of the respondent to the female sex, the question which would have to be answered is, what was the respondent's sex immediately before the operation? If the answer is that it depends on 'assignment', then if the decision at that time was female, the respondent would be a female with male sex organs and no female ones. If the 'assignment' to the female sex is made after the operation, then the operation has changed the sex. From this it would follow that if a 50 year old male transsexual, married and the father of children, underwent the operation, he would then have to be regarded in law as a female and capable of 'marrying' a man. The results would be nothing if not bizzare.

The reasoning in *Corbett's* case was adopted in the South African case of *W v. W* [1976] 2 SALR 308. The wife was a post operative male to female transsexual. The marriage had been consummated. Normal sexual relations took place and the breakdown of the marriage was not attributed to the wife's transsexuality.

Nestadt J held the marriage invalid and said (p. 313):

> I do not think I am adopting too technical an approach when I say that the plaintiff's evidence does not show that the operation converted her into a female. What it did was to artificially supply her with certain of the attributes of a woman, namely breasts and a vagina-like cavity. This, however, so it was argued, taking into account the fact that the plaintiff was (always) a transsexual and thus psychologically a woman was sufficient; that in her post-operative state and, in particular, because of her ability to have sex with the defendant, she was capable of fulfilling the essential role of a woman in marriage (and this, despite her inability to procreate) and that it will be anomalous to classify the plaintiff as male when she had the physical and psychological attributes of a female and was socially accepted as, and look like, a woman .... Imitation cannot be equated with actual transformation. If what I may call this pseudo-type of woman is, for the purposes of marriage, properly to be regarded as a female, then, in the absence of medical evidence justifying such a finding, the intervention of the legislature would be necessary.

In the Australian case of *Re C and D* (falsely called C) [1979] 28 ALR 524, the Australian Court had to consider whether the respondent, a hermaphrodite, could contract a valid marriage. He had some physical attributes, both of the male and female sex. He was born with one testicle and one ovary, as well as a uterus, a pair of well formed breasts and a penis. A rudimentary vagina was supposed to be present also, and he was subject to weak menstrual bleeding. He had a light moustache, but no beard growth.

In an attempt to "correct" his anatomical anomalies, he underwent a series of surgical operations, in the course of which his female attributes were removed and the conformation of his penis improved. He then married the petitioner and they lived together as man and wife for a period of some 5 years. The marriage was never consummated and in fact he had been unable to do so. There were two "children of the marriage" within the meaning of the Australian Family Law Act, one being a child of the wife's but not the husband's but accepted into the family by him, the other being adopted by the parties. His wife sought a divorce of nullity on the basis that she was mistaken as to the identity of her spouse at the time of marriage. She believed that he was a male whereas he was both male and female. In granting a decree on the ground of mistaken identity, Bell J said, at p. 527:

> The grounds for a void marriage were those contained in s.18(1) of 'the Matrimonial Causes Act 1959' and as I apprehend the submission of Counsel for the wife, the ground upon which he is relying is s. 18(1)(d):
>
> the consent of either of the parties is not a real consent because:
> (i) ...
> (ii) that party is mistaken as to the identity of the other party, or as to the nature of the ceremony performed;
>
> The ground of identity is in my opinion made out in that the wife was contemplating immediately prior to marriage and did in fact believe that she was marrying, a male. She did not in fact marry a male but a combination of both male and female and notwithstanding that the husband exhibited as a male, he was in fact not and the wife was mistaken as to the identity of her husband and the ground under 'the Matrimonial Causes Act' is made out.

After considering the English case, *Corbett v. Corbett* [1971] P83, the Australian Court said, at p. 528:

> In this case the husband, after surgery, exhibited as a male in two of the three criteria. However the chromosomal indications are that he is a female. This matter loomed large in the minds of the medical practitioners who carried out the surgical procedures upon the husband and their opinions were that he should be transformed into a male rather that a female since he had for a considerable number of years been treated as a male. Subsequent medical practice appears to casts some doubts upon this.

At p. 528 of his judgment, Bell J said:

> 'Marriage, according to law in Australia, is the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.' Identical words are used in s. 69(2) also.
>
> I am unaware of the law to which these words refer, but I have no hesitation in saying that the definition of 'marriage' as understood in Christendom is the voluntary union of one man and one woman to the exclusion of all others for life. See *Nachimson v. Nachimson* [1930] P 217 at 224.
>
> I am satisfied on the evidence that the husband was neither man nor woman but was a combination of both, and a marriage in the true sense of the word as within the definition referred to above could not have taken place and does not exist.

The Australian Court held the marriage to be void on two grounds and granted a decree on the ground of mistaken identity and said that the marriage was in any event a nullity the respondent was neither a man or woman but a combination of both.

***The Different Approach***

A different approach was taken in the decision of the Appellate Division of the Superior Court (New Jersey) in *MT v. JT* 355 A2d 204 [1976]. The parties had cohabited both before and after the marriage. The American Court said:

> Against the back drop of the evidence in the present record we must disagree with the conclusion reached in *Corbett* that for purposes of marriage sex is somehow irrevocably cast at the moment of birth, and that for a judging the capacity to enter marriage sex in its biological sense should be the exclusive standard. On this score the case has not escaped critical review. Comment 56 Cornell L Rev at 1003/1007; note:
>
> 'Transsexuals in Limbo' 31 Md L Rev 236 at 244 [1971]. Our departure from the *Corbett* thesis is not a matter of semantics. It extends from a fundamentally different understanding of what is meant by 'sex' for marital purposes. The English Court apparently felt that sex and gender were disparate phenomena. In a given case there may, of course, be such a difference.

> A pre-operative transsexual is an example of that kind of disharmony, and most experts would be satisfied that the individual should be classified according to biological criteria. The evidence and authority which we have examined, however, showed that a person's sex or sexuality embraces an individual's gender, that is, one's self image, the deep psychological or emotional sense of sexuality identity and character ... Implicit in the reasoning underpinning our determination is the tacit but valid assumption of the lower Court and the expert upon whom reliance was placed that for purposes of marriage under the circumstances of this case it is the sexual capacity of the individual which must be scrutinised. Sexual capacity or sexuality in this frame of reference requires the coalescence of both physical ability and the psychological and emotional orientation to engage in sexual intercourse as either a male or a female.

Later, (p. 211):

> In this case the transsexual's gender and genitalia are no longer discordant; they have been harmonised through medical treatment. The plaintiff has become physically and psychologically unified and fully capable of sexual activity consistent with her reconciled sexual attributes gender and anatomy. Consequently the plaintiff should be considered a member of the female sex for marital purposes. It follows that such an individual would have the capacity to enter into a valid marriage relationship with a person of the opposite sex and did so here. In so ruling we do no more than give legal effect to a fait accompli based upon medical judgment and action which are irreversible. Such a recognition will promote the individual's quest for inner peace and personal happiness, while in no way disserving any social interest principle of public order or precept of morality.

Notwithstanding the fact that an Australian Court has approved *Corbett's* decision, a different approach was taken by other Australian Courts in criminal cases.

In *R v. Cogley* [1989] VR 799, the accused was convicted of assault with intent to commit rape. The issue was whether the victim was capable of being raped, given that she was a post-operative transsexual. Cummins J at first instance did not follow *Corbett's* case and formulated the test in the following terms:

> I consider that the law should regard as a woman a male to female transsexual where core identity is established and where sexual reassignment surgery has taken place. I consider that both elements together are essential. I consider that core identity is a necessary but not sufficient condition in the finding of a male to female transsexual a woman.

On appeal, the Full Court took the position that whether the victim was capable of being raped was a question of fact to be left to the jury and not a matter of law for the Judge.

*Harris and McGuinness* [1988] 35 A Crim R146 was also an Australian criminal case. Both Harris and Phyllis were in business by way of prostitution. They made the error of soliciting members of the Vice Squad and were charged with the offence of soliciting. Under the New South Wales legislation, soliciting was an offence only if carried out by a male. Being a female would be a complete defence.

Lee Harris had undergone sexual reassignment surgery but not Phyllis McGuinness. Both of them dressed and conducted themselves as women. The defendants were convicted at first instance before a magistrate. The Court of Criminal Appeal drew a distinction between the appellants and did not follow *Corbett's* case. The majority of the Court took the view that Harris was not at the relevant time a "male person" within the meaning of the applicable legislation. Liability should not be determined by a person's chromosomal structure in the area of criminal liability.

Phyllis McGuinness had not undertaken reassignment surgery. The process of transformation was therefore incomplete and was a "male person".

The dissenting Judge took the view that no combination of surgery, hormonal therapy, and psychological attitude could override the congruence of the chromosomal, gonadal and genital factors which were all male. He said no distinction should be drawn between the appellants. He criticised the different approach taken in the New Jersey case. In his view an artificial cavity could not be described as a vagina in the anatomical sense and its use considered natural coitus; whether the post-operative transsexual is a male or a female is an issue of fact which could not be resolved by appearance.

Mrs Justice Matthews, who was supported by the Chief Justice, referring to Mr Justice Ormrod's reasons for ignoring the reassignment surgery in Corbett's case said:

> ... His Lordship's finding on this matter was apparently based upon two considerations which could broadly be described as medical and social. As to the former, he said (p. 104) it is common ground between all the medical witness that the biological sexual constitution of an individual is fixed at birth (at the latest) and cannot be changed either by the natural development of organs of the opposite sex or by medical or surgical means. The respondent's operation therefore cannot affect her true sex ...
>
> With the greatest of respect to Ormrod J this conclusion seems to flow not so much from the medical evidence which was given in the case is from His Lordship's own finding that certain biological features should be determinative and of a person's sex. Once it is resolved that chromosomes are to be treated as relevant on this issue then it must follow, except in the rare case where there is chromosomal abnormality, or unless other factors are allowed to override the chromosomal test, that one's sex is fixed at the moment of conception. The real question is whether the law should permit other factors to override the chromosomal test in the case of a post operative transsexual.

The Court restricted the observation of Ormrod J in *Corbett's* case on the effect of reassignment surgery to the context of marriage. The absence of sexual organs were rejected as not being decisive when dealing with the criminal law. Mrs. Justice Matthews cited a passage from an American Reviewer of *Corbett's* case:

> ... Society will lose nothing and transsexuals will gain the opportunity to lead normal lives if legal sex is determined not by chromosomes or anatomy of birth alone, but by present psychology and anatomy... (*Transsexuals in Limbo: The Search for a Legal Definition of Sex* [1971] 31 MdL Rev 235).

The question whether a distinction should be drawn between matrimonial and criminal cases where there has been surgery came up before the English Court of Appeal in *Regina v. Tan & Ors.* [1983] 1 QB 1053. The Court considered the contention that for purposes of s. 30 of the Sexual Offences Act 1956 and s.5 of the Sexual Offences Act 1967, the test in *Corbett's* case should not be applied if the person had become philosophically or psychologically or socially female and that person should be held not to be a man. The appeal was from a decision where the jury had convicted the accused.

The Court held:

> We reject this submission without hesitation. In our judgment both common sense and the desirability of certainty and consistency demand that the decision in *Corbett v. Corbett* should apply for the purpose not only of marriage but also for a charge under s. 30 of the Sexual Offences Act 1956 or s. 5 of the Sexual Offences Act 1967. The same test would apply also if a man had indulged in buggery with another biological man. That Corbett v. Corbett would apply in such a case was accepted on behalf of the appellant. It would, in our view, create an unacceptable situation if the law were such that a marriage between Gloria Greaves and another man was a nullity, on the ground that Gloria Greaves was a man; that buggery to which she consented with such other person was not an offence for the same reason; but that

> Gloria Greaves could live on the earnings of a female prostitute without offending against s. 30 of the Act of 1956, because for that purpose he/she was not a man and that the like position would arise in the case of someone charged with living on his earnings as a male prostitute.

In the name of common sense, desirability, certainty and consistency, the English matrimonial and criminal Courts have followed the decision in *Corbett's* case, both in marriages and in criminal cases. The Australian Courts have applied different tests to marriages and criminal cases to overcome problems arising from surgery. The South African Court has made a distinction between imitation and actual transformation. The American Court has disagreed with sex being fixed at birth and with sex in its biological sense being the exclusive standard for marriages. All the cases were considered in *Re "M"* (unreported), a New Zealand case decided on 30 May 1991, by the Family Court at Otahuhu (FP No 048/991/90).

The applicant in *Re "M"* applied for a declaration to the effect that the marriage was not valid by reason of the fact that the law of New Zealand required a marriage to be between a man and a woman, and that she was, at the time of the marriage, and continues to be, of the male sex for the purposes of the law of matrimony.

The applicant "M" was born a male in 1943 and was a male transsexual. In 1966, he changed his name by deed poll and again in 1970. He suffered various neurotic symptoms and on medical advice underwent sex conversion or reassignment surgery. The operation involved amputation of the penis and both testes and the construction of a vagina. Sexual intercourse was possible although the vagina was an artificial one. Conception, however, was an impossibility. The applicant gave evidence stating that "she actually achieves a sexual orgasm on occasion". The applicant dressed as a woman and lived her life as a woman.

In September 1977, the applicant married at the office of the Registry of Marriages. The marriage was solemnized by the Registrar of Marriages. The marriage lasted 12½ years before separation took place in 1990. The Court was asked to find that there had been no valid marriage, contending that she was not a woman and could not have entered into a legal marriage at the time of the registration of the marriage on 9 September 1977, notwithstanding having been socially and officially accepted and recognised physically and psychologically as a woman.

Mr Justice J R Aubin said:

> I find the judgment of Mrs Justice Matthews in Harris and McGuinness to be cogent and compelling, and in my view, in a given case, matrimonial as well as criminal, it is possible to conclude, as a matter of evidence, that the genetic starting point, the immutable biological factors, will not be determinative.

Later, he said:

> The applicant's core identity, to adopt the words of the Judge at first instance in the *Cogley* case, is that of a woman; her body has been brought into harmony with her psychological sex. Differing views are inevitable and legitimate, but in the end, in the absence of any binding authority which requires me to accept biological structure as decisive ... I incline to the view that however elusive the definition of 'woman' may be, the applicant came within it for the purposes of and at the time of the ceremony of marriage on 9 September 1977.

The Court made a declaration to the effect that the marriage was and remains a valid one. His Lordship, observing that there was no definition in the Marriage Act 1955, of "woman", also said that the "Act was silent as to the need for the parties to a marriage to be of different

sex". In the absence of any prescription of marriage between two persons of the same sex, the Judge found the marriage valid provided the technical requirements of the Act are complied with.

The test of "core identity" formulated in an Australian criminal case was adopted by Mr Justice J R Aubin in *Re "M"* in a matrimonial matter after noting that *Corbett's* case could not be reconciled with the American decision in *MT v. JT*. He questioned the wisdom of giving biological factors primacy and relied on the lacuna in the New Zealand Marriage Act of 1955. Mr. Justice Aubin decided that:

> genetic consideration can be displaced by events occurring in the course of the person's life that cumulatively take that person out of the sexual category in which he or she was born through a state of limbo and into the haven of the opposite sex.

***Marriages in Singapore***

Singapore law has in the past recognised more than one form of marriage. Marriages could be contracted by the parties consenting to be husband and wife. Religious and customary marriages were recognised. A Jew could contract a common law marriage with a Chinese woman. A Chinese man could take a Eurasian Roman Catholic woman as his secondary wife. A Jaffna Tamil Hindu marriage was monogamous but an Indian Tamil Hindu marriage was regarded as potentially polygamous. Monogamous and polygamous marriages were recognised and the traditional marriage under common law of the voluntary union for life of one man and one woman to the exclusion of all others was modified to prevent injustice or oppression. A marriage between persons of the same sex before or after surgery, however, did not come before the Courts for a decision, according to law.

In 1951, the definition of a monogamous marriage was introduced into the law by the Interpretation and General Clauses Bill which was passed by Legislature on 11 February 1950. The Select Committee accepted the definition in its entirety and the definition of monogamous marriages became law on 9 January 1951, by virtue of the Interpretation and General Clauses Ordinance 1951 (No. 4 of 1951). The introduction of the statutory definition of a monogamous marriage in 1951 did not, however, result in polygamous marriages ceasing to be recognised in law.

The definition of a monogamous marriage that was introduced in 1951 has remained unchanged in the law and now appears in s. 2 of the Interpretation Act (Cap 1). This definition applies to the Women's Charter and it reads as follows:

> 'monogamous marriage' means a marriage which is recognised by the law of the place where it is contracted as a voluntary union of one man and one woman to the exclusion of all others during the continuance of the marriage.

The problems that arose from the solemnization and status of being married arose from both monogamous and polygamous marriages and the marriages being solemnized and dissolved under personal and statutory laws, religions, customs and usages. A legal impediment to the marriage of persons who are not of opposite biological sex is implied in the statutory definition of the monogamous marriage.

***The Women's Charter***

The preamble to the Women's Charter enacted in 1961, provides that the Act is to provide for monogamous marriages and for the solemnization and the registration of such marriages, to amend and consolidate the law relating to divorce, the rights and duties of married persons,

the maintenance of wives and children and to provide for matters incidental thereto. The Charter introduced the traditional marriage or the voluntary union of one man and one woman for all Singaporeans except Muslims.

Marriages must be solemnized in accordance with the requirements of the Charter. The jurisdiction of the Court for the dissolution of marriages is limited to monogamous marriages or those marriages deemed to be monogamous. The Legislature has made it clear that in the case of non-Muslims, the marital contract, unlike ordinary contracts, cannot be varied by the parties whatever may have been the position under customary laws and usages. The State determines who may enter an enforceable marriage contract and the legal rights and duties that go with the marital status.

I now turn to the question raised in connection with identity cards and birth certificates.

***Identity Cards***

A person issued with an identity card must, under the National Registration Regulations 1991, report a change in his name or other particulars which are to his knowledge incorrect to the nearest registration office and apply for a replacement identity card.

Section 11 of the National Registration Act (Cap 201) places the onus of proving the truth of the contents of an identity card on the person to whom the identity cared was issued or on any other person alleging the truth of its contents. The particulars on the identity card are not conclusive evidence to establish the sex of a person for purposes of contracting a valid marriage under the Charter. The fact that the sex of the respondent was stated as a male on the identity card does not make her a male in law for purposes of marriage under the Charter.

***Birth Certificate***

Section 24 of the Registration of Births and Deaths Act (Cap 267) provides for the alteration of any error of fact or substance in any register may be corrected by entry so that no alteration of the original entry is made. The respondent's birth certificate described her as a female. The respondent had not taken any steps to alter the entry made in respect of her sex in the register of the Registrar-General of Births and Deaths.

*Rees v. UK* [1987] Family Law 157 and *Cossey v. UK* [1990] TLR are two English cases which involved persons who underwent surgical sexual conversion. Official documents were supplied to them allowing the use of their new names. Rees used the prefix "Mr" in his passport. Cossey's passport showed her to be a female. Both of them applied to alter the sex registered at their birth in the Birth Register. This was refused. The matter was taken to the European Court under the Convention for the Protection of Human Rights and Fundamental Freedoms. The European Court held in *Ree's* case:

> The mere refusal to alter the register of births could not be considered as interference. Regard had to be had to the fair balance that had to be struck between the general interest of the community and the interest of the individual.

and later:

> The proposed annotation would only establish that the applicant henceforth belonged to the other sex and the change would not mean the acquisition of all the biological characteristics of the other sex.

In Singapore identity cards are issued. On most social and official occasions, the sex shown on the identity card is accepted. Intimate personal details do not have to be revealed. Persons who seek to marry, however, are required to give a notice under the Women's Charter (Registration of Marriages) Rules 1981 and to file a statutory declaration under the Statutory Declarations Act 1835, to obtain a marriage licence. The prescribed form required the male and female to complete different parts of the same form and declare that the person does not know of any lawful impediment to the marriage.

The fact that the identity card and the birth certificate have the respondent's sex as male and female respectively does not require the Court to hold that a valid marriage has been solemnized between a man and a woman. The identity card and birth certificate are official documents that serve different purposes. Reassignment surgery does not result in the acquisition of all the biological characteristics of the other sex, and where the sex of a person is in issue, it must be proved to the satisfaction of the Court. An identity card standing alone is not sufficient evidence.

The European Court in *Cossey v. UK* [1990] TLR 664 accepted the criteria of English law as being in conformity with the concept of traditional marriage between persons of opposite biological sex. The Court also expressed the opinion that it was not open to the Court to take a new approach to marriage and that biological criteria should be adopted for determining a person's sex for the purpose of marriage.

The Women's Charter, besides providing for the solemnization of marriages, contains a part dealing with "Offences against Women and Girls". Male persons are liable to greater punishment for offences relating to prostitution under ss. 140(2) and 146(2).

It is desirable in the interests of certainty and consistency for the word "man" under the Charter to be given the ordinary meaning that is in contra distinction to woman. A person biologically a female with an artificial penis, after surgery and psychologically a male, must for purposes of contracting a monogamous marriage, of one man and one woman, under the Women's Charter be regarded as a "woman". Unlike the New Zealand Marriage Act of 1955, Singapore law is not silent on what constitutes a valid monogamous marriage.

The petitioner would not have consented to the marriage had she known that the respondent has undergone a sex-change operation. In the circumstances, she did not freely consent to the marriage. The marriage was therefore not solemnized on the authority of a valid licence and is also void on that ground under s.21 of the Charter.

The answer to the 3 questions must therefore be:

(a) A decree of nullity should be ordered.
(b) A person who has undergone a sex-change operation cannot be regarded as belonging to the sex for which reassignment surgery was undertaken for purposes of a monogamous marriage under the Charter.
(c) The fact that the commissioner for national registration permitted a change of particulars did not require the words "man" and "woman" to be given a meaning under the Charter to include persons with the reassigned sex.

The petitioner is entitled to a decree of nullity declaring that the marriage solemnized on 26 July 1990, between the petitioner and the respondent is void ab initio by reason that the parties to the marriage were both of the female sex, and, I order accordingly.

Also found at [1992] 1 CLJ 569